INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	3
Summary of argument	5
Argument:	
I. The ruling of this Court in the *Marchetti-Grosso* decisions that the privilege against self-incrimination is a defense to a criminal prosecution for non-payment of wagering taxes does not control forfeiture proceedings which are designed to remove offending property from circulation	8
A. Forfeiture actions are *in rem* proceedings which are remedial in nature, and do not seek to punish an individual	11
B. Property subject to forfeiture enjoys no privilege against self-incrimination which can be asserted to prevent forfeiture	17
C. Forfeiture proceedings under 26 U.S.C. 7302 do not violate the underlying spirit of the privilege against self-incrimination	25
II. At all events, the rationale of *Marchetti-Grosso* should not be applied retroactively to cases in which the seizure of property subsequently forfeited took place to prior the date of those decisions	29
Conclusion	35

329-565—68——1

CITATIONS

Cases:

	Page
Boyd v. *United States*, 116 U.S. 616	18
Brown v. *Walker*, 161 U.S. 591	18
Campbell Painting Co. v. *Reid*, 392 U.S. 286	20, 21, 26
Coffey v. *United States*, 116 U.S. 436	13
Cooper v. *California*, 386 U.S. 58	29
Counselman v. *Hitchcock*, 142 U.S. 547	18
DeStefano v. *Woods*, 392 U.S. 631	30, 31, 32
Dobbins's Distillery v. *United States*, 96 U.S. 395	11
Emspack v. *United States*, 349 U.S. 190	18
Four Packages v. *United States*, 97 U.S. 404	15
Gardner v. *Broderick*, 392 U.S. 273	26, 27, 35
Garrity v. *New Jersey*, 385 U.S. 493	26
Goldsmith-Grant Co. v. *United States*, 254 U.S. 505	11, 13
Griffin v. *California*, 380 U.S. 609	25, 26, 31, 32
Grosso v. *United States*, 390 U.S. 62	2, 4, 5, 6, 7, 8, 9, 10, 17, 18, 19, 22, 23, 25, 27, 29, 30, 31, 32, 34, 35
Hale v. *Henkel*, 201 U.S. 43	18
Helvering v. *Mitchell*, 303 U.S. 391	13, 16, 18
Interstate Commerce Commission v. *Brimson*, 154 U.S. 447	18
Johnson v. *New Jersey*, 384 U.S. 719	30, 31, 32
Kaufman v. *Hurwitz*, 176 F. 2d 210	21
Kent v. *United States*, 157 F. 2d 1	17, 18
Kimm v. *Rosenberg*, 363 U.S. 405	21
Lewis v. *United States*, 348 U.S. 419	4, 8, 32, 34
Lilienthal's Tobacco v. *United States*, 97 U.S. 237	15
Linkletter v. *Walker*, 381 U.S. 618	30
Malloy v. *Hogan*, 378 U.S. 1	31
Mapp v. *Ohio*, 367 U.S. 643	19
Maryland v. *Soper*, 270 U.S. 9	27

Cases—Continued

Page

Marchetti v. *United States*, 390 U.S. 39 ... 2, 4, 5, 6, 7, 8, 9, 10, 17, 18, 19, 22, 23, 25, 27, 29, 30, 31, 32, 34, 35

McCarthy v. *Arndstein*, 266 U.S. 34 ... 18

Miranda v. *Arizona*, 384 U.S. 436 ... 18, 31

One 1958 Plymouth Sedan v. *Pennsylvania*, 380 U.S. 693 ... 18, 19, 25

Orloff v. *Willoughby*, 345 U.S. 83 ... 27

Palmyra, The, 12 Wheat. 1 ... 11, 12

Preston v. *United States*, 376 U.S. 364 ... 29

Quinn v. *United States*, 349 U.S. 155 ... 18

Sanitation Men v. *Sanitation Commissioner*, 392 U.S. 280 ... 26, 27

Schmerber v. *California*, 384 U.S. 757 ... 27

Spevack v. *Klein*, 385 U.S. 511 ... 26, 27

Stovall v. *Denno*, 388 U.S. 293 ... 30, 31, 32

Sultzbach Clothing Co. v. *United States*, 10 F. 2d 363 ... 34

Tehan v. *Shott*, 382 U.S. 406 ... 30, 31, 32

Ullmann v. *United States*, 350 U.S. 422 ... 27

United States v. *Angelini*, 346 F. 2d 278, certiorari denied, 382 U.S. 838 ... 4

United States v. *Bride*, 308 F. 2d 470 ... 16

United States v. *Dixon*, 347 U.S. 381 ... 17

United States v. *Harvin*, 91 F. Supp. 249 ... 19

United States v. *Kahriger*, 345 U.S. 22 ... 4, 8, 32, 34

United States v. *One 1958 Pontiac Coupe*, 298 F. 2d 421 ... 16

United States v. *One 1965 Buick*, 392 F. 2d 672, pending on petition for a writ of certiorari, No. 619, this Term ... 5, 22, 23, 25

United States v. *Stowell*, 133 U.S. 1 ... 11, 35

United States v. *Windle*, 158 F. 2d 196 ... 17

United States v. *Zucker*, 161 U.S. 475 ... 15

Van Oster v. *Kansas*, 272 U.S. 465 ... 13

Various Items v. *United States*, 282 U.S. 577 ... 11, 13, 15

Washington v. *United States*, 402 F. 2d 3 ... 9, 23

Constitution, statutes and rules:
U.S. Constitution:
Fourth Amendment 18, 29
Fifth Amendment 5, 7, 11, 24, 27, 28, 31, 32
Gun Control Act of 1968 (82 Stat. 1213), Title 18, Ch. 44, Sec. 924 14
National Prohibition Act of October 28, 1919 (41 Stat. 315), Title II:
Sec. 25 13
Sec. 26 13
19 U.S.C. 1618 15
26 U.S.C. 4401 ..... 5, 9, 20
26 U.S.C. 4411 ..... 3, 4, 5, 8, 9, 20, 32
26 U.S.C. 4412 ..... 3, 4, 5, 9, 20, 32
26 U.S.C. 4901 3
26 U.S.C. 5763 14
26 U.S.C. 5862(a) 14
26 U.S.C. 7203 16
26 U.S.C. 7272 16
26 U.S.C. 7302 ..... 2, 3, 6, 7, 11, 13, 14, 15, 16, 17, 18, 19, 22, 23, 24, 25, 28, 31, 33
26 U.S.C. 7323 16
26 U.S.C. 7327 15
26 U.S.C. 7406 ..... 16, 33
28 U.S.C. 2461 16
40 U.S.C. 304(h) 33
40 U.S.C. 304(i) 33
49 U.S.C. 781 14
F.R. Crim. P., Rule 41 19
Miscellaneous:
Note, *Forfeiture of Property Used in Illegal Acts*, 38 Notre Dame Lawyer 727 (1963) 13

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 477

UNITED STATES OF AMERICA, PETITIONER

v.

UNITED STATES COIN AND CURRENCY IN THE AMOUNT OF $8,674, DONALD ANGELINI, CLAIMANT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (A. 16–18) is reported at 393 F. 2d 499.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 1968. Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to September 6, 1968, and on September 4, 1968, the petition was filed. Certiorari was granted on November 18, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether this Court's decisions in *Marchetti* v. *United States*, 390 U.S. 39, and *Grosso* v. *United States*, 390 U.S. 62, prohibiting the criminal prosecution of individuals who properly assert the privilege against self-incrimination as a ground for non-compliance with the federal wagering tax laws, preclude the forfeiture, under 26 U.S.C. 7302, of property used in violation of these laws.

2. Whether, if the rationale of those decisions is applicable to forfeiture proceedings, it should be applied retroactively to cases in which seizures of the forfeitable property occurred prior to the date those decisions were rendered.

STATUTE INVOLVED

26 U.S.C. 7302 provides:

> It shall be unlawful to have or possess any property intended for use in violating the provisions of the internal revenue laws, or regulations prescribed under such laws, or which has been so used, and no property rights shall exist in any such property. A search warrant may issue as provided in chapter 205 of title 18 of the United States Code and the Federal Rules of Criminal Procedure for the seizure of such property. Nothing in this section shall in any manner limit or affect any criminal or forfeiture provision of the internal revenue laws, or of any other law. The seizure and forfeiture of any property under the provisions of this section and the disposition of such property subsequent to seizure and forfeiture, or the disposition of the proceeds from the sale

of such property, shall be in accordance with existing laws or those hereafter in existence relating to seizures, forfeitures, and disposition of property or proceeds, for violation of the internal revenue laws.

STATEMENT

On February 18, 1964, a libel was filed in the United States District Court for the Northern District of Illinois seeking the forfeiture of $8,674 to the United States under 26 U.S.C. 7302. A claim to the respondent money was filed by claimant Angelini. The libel alleged, *inter alia,* that a gambling business had been conducted by claimant Angelini without his having registered or paid the special occupational tax as required under 26 U.S.C. 4411 and 4412, in violation of 26 U.S.C. 4901; that the $8,674 at issue had been used or intended for use in that illegal business; and that respondent money had thus been lawfully seized by the government (A. 5–6).

Claimant Angelini denied the illegal operation of a gambling business, and denied that the money seized had been used or intended for use in that business (A. 7–8). The bulk of the testimony at trial showed that Angelini and one Joseph Altiere conducted a bookmaking operation at Sportsman's Park, a Cicero, Illinois, racetrack, during the month of August 1963, and that the $8,674 involved was being used in that business, as "ready cash" to pay off betting customers (Tr. 11–187). Also entered into evidence was a stipulation to the effect that Angelini had not registered as a person engaged in the business of wagering as required by 26 U.S.C. 4412, or paid the special oc-

cupational tax as required by 26 U.S.C. 4411 (Tr. 8-10), and that he had been convicted in 1964 for those criminal violations.[1] At the conclusion of the trial, the district court found that a gambling business had been conducted by claimant Angelini in violation of 26 U.S.C. 4411 and 4412, and that the money, which he had been carrying on his person at the time of his arrest, had been used in that illegal business (A. 9–10). Accordingly, forfeiture of respondent $8,674 was awarded to the United States (A. 11).

Although not raised at trial, claimant contended in the court of appeals that the forfeiture of property used in violation of 26 U.S.C. 4411 and 4412 violated his privilege against self-incrimination. The court of appeals withheld opinion pending disposition of *Marchetti* and *Grosso* by this Court at the 1966 Term. When reargument was ordered in those cases on June 12, 1967 (388 U.S. 903, 904), however, the court of appeals proceeded to affirm the judgment of forfeiture on the authority of *United States* v. *Kahriger*, 345 U.S. 22, and *Lewis* v. *United States*, 348 U.S. 419 (A. 12-15; 379 F. 2d 946). A petition for certoriari was filed by claimant Angelini, and following this Court's decisions in *Marchetti* v. *United States*, 390 U.S. 39, and *Grosso* v. *United States*, 390 U.S. 62, on January 29, 1968, the

[1] See *United States* v. *Angelini*, 346 F. 2d 278 (C.A. 7), certiorari denied, 382 U.S. 838, an appeal from Angelini's criminal conviction for violations of 26 U.S.C. 4411 and 4412. On appeal in that proceeding, Angelini challenged the sufficiency of the evidence to show that the money had been used in a gambling business. That contention, however, was abandoned in his petition for a writ of certiorari in this Court filed before the *Marchetti-Grosso* opinions.

case was remanded for reconsideration in light thereof (390 U.S. 204). Thereafter, the court below held that claimant Angelini's privilege against self-incrimination constituted a defense against a forfeiture proceeding brought against the respondent property (A. 16–18; 393 F. 2d 499). Accordingly, it reversed the district court's judgment of forfeiture and remanded for the entry of an appropriate judgment in claimant's favor (A. 19). The government sought certiorari, noting the direct conflict between that holding and the decision of the Sixth Circuit in *United States* v. *One 1965 Buick,* 392 F. 2d 672 (C.A. 6), pending on petition for a writ of certiorari, No. 619, this Term, where the court held *Marchetti-Grosso* inapplicable to forfeiture proceedings.

SUMMARY OF ARGUMENT

I

In *Marchetti* v. *United States,* 390 U.S. 39, and *Grosso* v. *United States,* 390 U.S. 62, this Court held that the Fifth Amendment privilege against self-incrimination affords a complete defense against criminal convictions based upon failures to register or pay the occupational and excise taxes as required by 26 U.S.C. 4401, 4411, and 4412. Nothing in those decisions, or the underlying rationale of the privilege against self-incrimination, however, precludes a forfeiture of property used in violation of the wagering tax laws.

Traditionally, statutory forfeitures have been viewed as proceedings *in rem* against property used in violation of the law. Unlike the common-law doctrine of

forfeiture—which attached as part and parcel of the criminal conviction—statutory forfeitures are not dependent upon a criminal conviction of the offender, nor must the owner of the particular goods seized share any criminal responsibility. It was in accord with this concept that the statute here in issue (26 U.S.C. 7302) was enacted. In contrast to those statutes providing for criminal sanctions, Congress enacted Section 7302—which is not limited to wagering tax violations—with the clear purpose of removing the offending property from circulation, and not punishing an individual offender. To this end, Congress has designated that statutory forfeiture proceedings are directed against property, not persons, and that the property so forfeited should be treated as collections of internal revenue.

In this setting, therefore, it is clear that neither the *Marchetti-Grosso* rationale, nor the underlying spirit of the privilege against self-incrimination, prohibits a forfeiture of property used in violation of the wagering tax laws. Those laws remain valid as taxing provisions, notwithstanding *Marchetti-Grosso,* and the prescribed taxes are collectible civilly. Engagement in the gambling business without payment of the prescribed taxes is thus illegal, and property so used in an illegal business is subject to forfeiture under 26 U.S.C. 7302, the basic purpose of which is to remove such offending property from circulation.

Even if forfeiture of property could be deemed a "penalty" arising out of the invocation of the privilege against self-incrimination, it is a penalty which attaches to the property, and not to the person who

seeks to invoke the privilege. Since property—unlike a natural person—does not enjoy any privilege against self-incrimination under the Fifth Amendment, no bar to a forfeiture for violations of the wagering tax laws is thereby provided.

Apart for the *Marchetti-Grosso* decisions, forfeiture proceedings do not result in the imposition of a "penalty" impermissible under the privilege as a general matter. Recent decisions of this Court establish no blanket rule in this regard. Here the "penal" aspect, if any, is an attenuated one. Moreover, if forfeitures under 26 U.S.C. 7302 in the wagering tax context are viewed as imposing a penalty, the same conclusion would presumably be reached as to all forfeitures under that statute. Such a result would render the statute nugatory, and is not required by the Fifth Amendment, in the wagering tax context or otherwise.

II

If this Court should hold the *Marchetti-Grosso* rationale applicable to forfeiture proceedings brought under Section 7302, it should nonetheless not be applied to cases in which seizures were made prior to January 29, 1968—the date of those decisions. Although we have not urged a rule of non-retroactivity as to criminal convictions imposed for violations of the wagering tax laws, forfeiture proceedings entail different considerations which militate against a rule of retroactive application.

When considered in the context of a forfeiture proceeding—where the privilege is, at most, peripherally involved—the purpose of the new rule must, we be-

lieve, yield to other considerations. Governmental reliance upon the prior doctrine, as set forth in *United States* v. *Kahriger,* 345 U.S. 22, and *Lewis* v. *United States,* 348 U.S. 419, is plain, and the burden that a retrospective application of the new rule would have upon the due administration of justice is demonstrable.

In reliance upon *Kahriger* and *Lewis,* approximately $6.5 million of property used in violation of the wagering tax laws has been seized for forfeiture to the government. In all likelihood, not even a major part of that property would be subject to return if *Marchetti-Grosso* were retroactively applied to forfeitures. Nonetheless, the potentialities of litigation relating to this matter are so great that this Court should make clear that the rationale of those decisions does not serve to divest the government of title to property validly acquired through forfeitures prior to the date of the decisions.

ARGUMENT

I. THE RULING OF THIS COURT IN THE *MARCHETTI-GROSSO* DECISIONS THAT THE PRIVILEGE AGAINST SELF-INCRIMINATION IS A DEFENSE TO A CRIMINAL PROSECUTION FOR NON-PAYMENT OF WAGERING TAXES DOES NOT CONTROL FORFEITURE PROCEEDINGS WHICH ARE DESIGNED TO REMOVE OFFENDING PROPERTY FROM CIRCULATION

In *Marchetti* v. *United States,* 390, U.S. 39, and *Grosso* v. *United States,* 390 U.S. 62, this Court held that the Fifth Amendment privilege against self-incrimination affords a proper defense to criminal punishment for failing to pay the special occupational tax on wagering imposed by 26 U.S.C. 4411, or the

ten-percent excise tax on wagers imposed by 26 U.S.C. 4401. In so holding, however, the Court did not rule that the wagering tax laws as such were unconstitutional. The Court emphasized in *Marchetti*:

> The issue before us is *not* whether the United States may tax activities which a State or Congress has declared unlawful. The Court has repeatedly indicated that the unlawfulness of an activity does not prevent its taxation, and nothing that follows is intended to limit or diminish the vitality of those cases. [390 U.S. at 44.]
>
> * * * * *
>
> * * * We do not, as we have said, doubt Congress' power to tax activities which are, wholly or in part, unlawful. [390 U.S. at 58.]
>
> * * * * *
>
> * * * [N]othing we do today will prevent either the taxation or the regulation by Congress of activities otherwise made unlawful by state or federal statutes. [390 U.S. at 60.]

From this language it is clear that *Marchetti* and *Grosso* hold neither that the wagering taxes as such are constitutionally impermissible,[2] nor that the operation of a gambling business without payment of the required taxes is lawful as a matter of federal law. Rather, the limited holding of those cases was clearly and precisely articulated in the Court's opinions. In *Marchetti*, it was stated:

> * * * For reasons which follow we have concluded that these provisions [26 U.S.C. 4411, 4412] may not be employed to *punish criminally*

[2] See also *Washington* v. *United States*, 402 F. 2d 3 (C.A. 4), holding that *Marchetti* and *Grosso* do not preclude collection of the ten-percent excise tax in a civil suit.

> those persons who have defended a failure to comply with their requirements with a proper assertion of the privilege against self-incrimination. [390 U.S. at 41–42; emphasis added.]
>
> * * * * * * * * [W]e hold only that those who properly assert the constitutional privilege as to these provisions may not be *criminally punished* for failure to comply with their requirements. [390 U.S. at 61; emphasis added.]

And in *Grosso,* the Court explicitly noted (390 U.S. at 69–70, n. 7):

> We do not hold today either that the excise tax is as such constitutionally impermissible, or that a proper claim of privilege extinguishes liability for taxation; we hold only that such a claim of privilege precludes a *criminal conviction* premised on failure to pay the tax. [Emphasis added.]

In light of this clear and explicit holding, it is our position that the rationale of *Marchetti-Grosso* precludes, upon proper invocation of the privilege, criminal punishment for violation of the wagering tax laws—but nothing more. Those decisions in no respect extinguish civil liability for the prescribed taxes, and should not be extended so as to prevent the forfeiture of property used in a wagering business conducted in violation of law. The court below erred in so enlarging the reach of those holdings, and its erroneous decision—in conflict with that of the Sixth Circuit (see *supra,* p. 5)—should be reversed.

A. FORFEITURE ACTIONS ARE *IN REM* PROCEEDINGS WHICH ARE REMEDIAL IN NATURE, AND DO NOT SEEK TO PUNISH AN INDIVIDUAL

At the outset, it is appropriate to focus on the wording of the Self-Incrimination Clause of the Fifth Amendment: "No person * * * shall be compelled in any criminal case to be a witness against himself." That this provision should be applicable in the present circumstances is far from obvious. Unlike the common-law doctrine of forfeiture, under which a convicted felon forfeited his goods and chattels to the crown as part and parcel of the criminal conviction, statutory forfeitures—with long antecedents in our jurisprudence—have always been viewed as *in rem* proceedings brought against the property itself. *Goldsmith-Grant Co.* v. *United States,* 254 U.S. 505, 510–511. See also *The Palmyra,* 12 Wheat. 1, 14; *Dobbins's Distillery* v. *United States,* 96 U.S. 395, 399–401; *United States* v. *Stowell,* 133 U.S. 1; *Various Items* v. *United States,* 282 U.S. 577, 580–581. Indeed, the nature of statutory forfeiture proceedings, such as those brought under 26 U.S.C. 7302, is evidenced by the fact that the property itself is the respondent, and that a libel is filed by the government against that property which must show only that the property was used in violation of federal law (see A. 5–6). For these reasons, it has long been established that the success of forfeiture proceedings is not dependent upon the criminal conviction of the user or possessor of the property at the time of its seizure, or upon the criminality *vel non* of its owner. As was stated by Mr. Justice Story in *The Palmyra,* 12 Wheat. 1, 14–15:

* * * It is well known, that at common law, in many cases of felonies, the party forfeited his goods and chattels to the crown. The forfeiture did not, strictly speaking, attach *in rem;* but it was a part, or, at least, a consequence, of the judgment of conviction. It is plain, from this statement that no right to the goods and chattels of the felon could be acquired by the crown, by the mere commission of the offence; but the right attached only by the conviction of the offender. The necessary result was, that in every case where the crown sought to recover such goods and chattels, it was indispensable to establish its right, by producing the record of the judgment of conviction. In the contemplation of the common law, the offender's right was not divested, until the conviction. But this doctrine never was applied to seizures and forfeitures created by statute, *in rem,* cognizable on the revenue side of the exchequer. The thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing; and this, whether the offence be *malum prohibitum,* or *malum in se.* The same principle applies to proceedings *in rem* on seizures in the admiralty. Many cases exist, where the forfeiture for acts done attaches solely *in rem,* and there is no accompanying penalty *in personam*; many cases exist, where there is both a forfeiture *in rem* and a personal penalty. But in neither class of cases, has it ever been decided, that the prosecutions were dependent upon each other. But the practice has been, and so this court understands the law to be, that the proceeding *in rem* stands independent of, and wholly un-

affected by, any criminal proceeding *in personam*.

See also *Various Items* v. *United States, supra,* and *Helvering* v. *Mitchell,* 303 U.S. 391; but compare *Coffey* v. *United States,* 116 U.S. 436. This Court has on several occasions held that the lack of criminality of the owner-claimant of the property involved is wholly irrelevant in forfeiture proceedings. *Goldsmith-Grant Co.* v. *United States,* 254 U.S. 505; *Van Oster* v. *Kansas,* 272 U.S. 465.[3]

The theory underlying statutory forfeitures is that, when property used in violation of law is removed from circulation, the statutory purpose of the underlying legislation will be fostered, and at least to some extent served, whether or not the individual offender is caught and brought to justice. Indeed, in a forfeiture proceeding it is the property itself that, in a real sense, is the offender, and thus the defendant. For example, Section 25 of Title II of the National Prohibition Act of October 28, 1919 (41 Stat. 315), from which the present general forfeiture statute in the tax area—26 U.S.C. 7302—is derived, was clearly designed to remove liquor, and property used in its manufacture, from circulation, without regard to criminal conviction of the offender.[4] Had it proved

---

[3] For a general discussion of the subject, see Note, *Forfeiture of Property Used in Illegal Acts*, 38 Notre Dame Lawyer, 727 (1963).

[4] Compare Section 26 of the same statute (41 Stat. 315–316), which specifically provided that forfeiture of *vehicles* used in violation of the law could be effected only after *conviction* of the offender.

329-565—68——3

possible to seize and destroy all intoxicating liquor and property used in the illegal manufacture of liquor, the prohibition laws would have been effective even if no offender ever went to jail. Admittedly, the use of forfeiture as a means of enforcing a tax is somewhat more indirect, for the essential aim of taxation is the raising of revenue. Nonetheless, a business subject to valid taxes is operating illegally if those taxes are not paid. And if the property used in such a business is removed from circulation when the taxes are not paid, such an illegal business will not be able to function, at least very effectively, whether or not its operator is convicted of a crime.

For this reason, forfeiture has been decreed by Congress as a means of enforcing many taxes which have none of the deterrent purposes of taxes relating to matters such as gambling or narcotics. Indeed, forfeitures under the statute here involved—26 U.S.C. 7302—are in no respect limited to those resulting from violations of the wagering tax laws. Property used in violation of laws relating to tobacco taxes (26 U.S.C. 5763), in violation of laws relating to taxes on firearms (26 U.S.C. 5862(a)); in violation of the Gun Control Act of 1968 (Ch. 44, Sec. 924 of Title 18; 82 Stat. 1213, 1223–1224); in violation of laws relating to the transportation in interstate commerce of contraband articles (49 U.S.C. 781); and in violation of certain laws relating to the taxation of distilled spirits, is also subject to forfeiture under that section. Congress has, to be sure, undertaken to alleviate to some extent the particular hardship to innocent individuals which may result from forfeitures by providing for remission and

mitigation.[5] But the decision to grant such relief reinforces rather than negates the notion that statutory forfeitures are designed essentially to remove the offending property from circulation, without regard to whether or not the violator of the particular law is himself criminally convicted.

The difference between forfeiture proceedings and criminal prosecutions has been recognized in regard to procedure as well as substance. Thus, in a forfeiture proceeding, the trial court may, upon a proper evidentiary showing, direct a verdict in favor of the government. *Four Packages* v. *United States,* 97 U.S. 404, 412. Unlike the principles governing a criminal case, the government's burden of proof is less than that of guilt beyond a reasonable doubt, and the burden may even shift to the claimant. *Lilienthal's Tobacco* v. *United States,* 97 U.S. 237, 265–267. In a forfeiture proceeding, a claimant does not enjoy the Sixth Amendment right to confrontation, *United States* v. *Zucker,* 161 U.S. 475, and the government may appeal from an adverse decision (*ibid,* by implication). A criminal conviction or acquittal of a defendant for the acts giving rise to the forfeiture proceeding does not bar the *in rem* action against the property. *Various Items* v. *United States,* 282 U.S. 577. In sum, the type of forfeiture proceeding here involved has never been deemed the equivalent of a criminal action.

---

[5] The remission and mitigation procedures applicable to seizures under the customs laws (19 U.S.C. 1618) are also applicable to forfeiture proceedings under 26 U.S.C. 7302. See 26 U.S.C. 7327.

Specifically, this has been the consistent approach with respect to 26 U.S.C. 7302, the statute here at issue. The statute presently provides, in pertinent part:

> It shall be unlawful to have or possess any property intended for use in violating the provisions of the internal revenue laws, or regulations prescribed under such laws, or which has been so used, and no property rights shall exist in any such property.

No mention is made in that statute that forfeiture is in any respect dependent or contingent upon the criminal conviction of anyone. Indeed, the carrying on of a business without payment of the prescribed taxes is made a crime elsewhere in the provisions of the Internal Revenue Code, and separate and distinct criminal sanctions are imposed thereunder (26 U.S.C. 7203, 7272). Cf. *Helvering* v. *Mitchell,* 303 U.S. 391, 404–405. The statute does not distinguish between forfeitures of property from violators of the underlying law and forfeitures from those who share no criminal responsibility. See, *e.g., United States* v. *Bride,* 308 F. 2d 470 (C.A. 9); *United States* v. *One 1958 Pontiac Coupe,* 298 F. 2d 421 (C.A. 7). Moreover, Congress has specifically provided that forfeiture proceedings brought under Section 7302 shall be in the nature of *in rem* proceedings (26 U.S.C. 7323; see also 28 U.S.C. 2461), and that the proceeds of such proceedings should be paid to the Secretary of the Treasury "as collections of internal revenue taxes" (26 U.S.C. 7406). In light of all these considerations, this Court has properly noted that forfeiture proceedings brought under 26 U.S.C.

7302 are "preventative and remedial" in nature. *United States* v. *Dixon,* 347 U.S. 381, 382, n. 1; see also *Kent* v. *United States,* 157 F. 2d 1 (C.A. 5); *United States* v *Windle,* 158 F. 2d 196 (C.A. 8). They seek not to punish any individual for violating a certain law, but rather to correct that violation, to the extent possible, by removing the property used in connection therewith from circulation.

B. PROPERTY SUBJECT TO FORFEITURE ENJOYS NO PRIVILEGE AGAINST SELF-INCRIMINATION WHICH CAN BE ASSERTED TO PREVENT FORFEITURE

Once the essential nature of statutory forfeiture is recognized—that it is a means of keeping property used in an illegal business out of circulation, without regard to the personal criminality of the owner—then it becomes clear that neither the actual holdings of the *Marchetti-Grosso* decisions nor their underlying rationale, as regards the privilege against self-incrimination, proscribes forfeitures of property used in violation of the wagering tax laws.

The *Marchetti-Grosso* decisions rest on the premise that a person may not be criminally convicted for failing to take certain actions, *i.e.,* registration and payment of prescribed taxes, when to do so would result in subjecting himself to substantial hazards of incrimination. But no individual is sent to prison when a forfeiture occurs, no criminal conviction results. In fact, the government may be awarded a judgment of forfeiture even though no person is criminally convicted for the offense giving rise to the forfeiture, and even though the owner-claimant of the forfeited property has no criminal responsibility. One whose

property is forfeited has no criminal "record" which can later be used against him. Forfeitures of property authorized under Section 7302 are thus not criminal sanctions within the meaning of *Marchetti-Grosso*. Contrary to the holding below, therefore, forfeiture proceedings are not barred by those decisions. Neither *Boyd* v. *United States*, 116 U.S. 616, nor *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693, relied upon by the court below (A. 17–18), requires a different result.[6]

---

[6] In *Boyd*, a subpoena was served upon the claimant to produce certain records and invoices which were clearly incriminating in themselves. In holding that the subpoena was improperly issued under those circumstances, the Court simply stated the now well-established doctrine that the right to refuse to divulge incriminating facts is not limited by the nature of the proceeding, but may be asserted before a grand jury investigation (*Counselman* v. *Hitchcock*, 142 U.S. 547; *Brown* v. *Walker*, 161 U.S. 591; *Hale* v. *Henkel*, 201 U.S. 43); in civil proceedings (*McCarthy* v. *Arndstein*, 266 U.S. 34); in investigations before a legislature or legislative body (*Quinn* v. *United States*, 349 U.S. 155; *Emspack* v. *United States*, 349 U.S. 190); in investigations before administrative agencies (*Interstate Commerce Commission* v. *Brimson*, 154 U.S. 447); or indeed, in police stations (*Miranda* v. *Arizona*, 384 U.S. 436). Moreover, in *Boyd* the Court construed the forfeiture statute under which the government was proceeding not as providing for an action basically remedial in nature, but as involving a forfeiture similar to that provided for under the common-law concept of forfeiture—that is, a proceeding under which "* * * the forfeiture of the goods could have been included in the judgment [of conviction]" (*Boyd*, 116 U.S. at 634). In addition, *Boyd* had Fourth Amendment implications which are not present here.

It is clear that the *Boyd* principle does not apply to forfeiture proceedings which are remedial in nature. *Helvering* v. *Mitchell*, 303 U.S. 391, 404, n. 12; see also *Kent* v. *United*

More basically, the rationale underlying Section 7302 indicates that forfeitures thereunder, in fact as well as in form, are directed against property, and are designed to remove the property from circulation so that an illegal business cannot function effectively. Items of property have no privilege against self-incrimination, for the privilege, literally and historically, is uniquely personal in nature. So long as the tax is valid—and this Court made clear in the *Marchetti-Grosso* decisions that the wagering tax laws are—the property used in a gambling business on which the prescribed taxes have not been paid is being used in violation of the law. In many instances of forfeiture, the person responsible for the non-payment of such taxes may not be the owner of the property at all. Thus, if a gambler, using borrowed equipment,

---

States, 157 F. 2d 1, 2 (C.A. 5); *United States* v. *Harvin*, 91 F. Supp. 249, 250 (E.D. Va.). It likewise seems clear that it was the former type of forfeiture to which the Court was referring in *Plymouth* when it stated that "a forfeiture proceeding is quasi-criminal in character [since] [i]ts object, like a criminal proceeding, is to penalize for the commission of an offense against the law" (380 U.S. at 700). As the foregoing discussion shows (*supra*, pp. 11–17), that cannot fairly be said about forfeiture proceedings under 26 U.S.C. 7302.

Moreover, in the *Plymouth* case, the question was whether evidence illegally seized by State officials could be introduced into evidence in a forfeiture proceeding brought by the State of Pennsylvania. In holding that such evidence was inadmissible under *Mapp* v. *Ohio*, 367 U.S. 643, the Court based its decision in part on the construction given to the forfeiture statute by the Pennsylvania Superior Court as a "penalty" (*Plymouth*, 380 U.S. at 701–702). And see Rule 41, F.R. Crim. P., wherein it is stated that illegally obtained evidence "shall not be admissible in evidence at *any* hearing or trial" (emphasis added).

fails to register and pay the taxes under the provisions of 26 U.S.C. 4401, 4411 and 4412, and the property is thereafter forfeited, the innocent owner, and not the gambler, suffers a loss unconnected with the privilege. Although it may be argued that the loss was occasioned by the assertion of the privilege by the gambler, the innocent owner cannot derive any benefit therefrom, because the privilege is personal and may be exercised only by the person in whom it adheres. It is the *fact* of use in an illegal business, and not the reason for the illegality, which determines the liability of property for forfeiture. Even if the reason for the illegality of such use is that the owner of the property failed to pay taxes because of fear of self-incrimination, the fact remains that the property is being utilized illegally. As such, then, it is subject to forfeiture.

This analysis, we suggest, makes the present case indistinguishable in principle from the situation involved in *Campbell Painting Corp.* v. *Reid,* 392 U.S. 286. In that case a New York statute provided that all contracts awarded by a public authority must include a clause providing for cancellation of the contract upon the invocation of the privilege against self-incrimination by any corporate officer before a grand jury. During 1964, appellant—a closely held family corporation—was party to three painting contracts containing the standard disqualification clause. In 1965, the president of the corporation—who owned approximately ten percent of its stock—refused to testify before a grand jury investigating alleged bid rigging on public contracts. As a consequence, the con-

tracts of the corporation were cancelled. In rejecting an argument that the cancellation of the contract constituted an unconstitutional penalty imposed upon the invocation of the privilege, the Court pointed out that the privilege was applicable only to natural persons, and not to corporations. Thus, the Court ruled, appellant corporation could not "take advantage of the claimed invalidity of a penalty imposed for refusal of an individual, its president, to wave the privilege" (392 U.S. at 289). Here, similarly, the respondent property itself does not enjoy any privilege against self-incrimination, and cannot take advantage of the claimed invalidity of any penalty allegedly imposed upon a gambler who failed to register and pay the appropriate taxes to avoid potential self-incrimination. To like effect, it has been held that the privilege has not been violated where, in order to obtain a benefit a person must disclose facts which, in exercise of the privilege he could not in another context have been compelled to disclose. *E.g., Kimm* v. *Rosenberg,* 363 U.S. 405 (relief from deportation); *Kaufman* v. *Hurwitz,* 176 F. 2d 210 (C.A. 4) (discharge in bankruptcy). So, here, the fact that a person may not, because of the privilege, be criminally prosecuted for failure to pay a valid tax, does not give him the affirmative right to avoid the force of the general provision that any property used in a business operated in violation of law is subject to removal from circulation by forfeiture.

There is, to be sure, some force to the observation of the court below that the claimant "would have subjected himself to exactly the same hazards" as Mar-

chetti and Grosso by complying, although it recognized that "the consequences of noncompliance are not the same in the two cases" (A. 17). The court suggested that "the prospect of losing in excess of $8,000 has a substantial coercive effect," while acknowledging that "[t]he prospect of a felony conviction involved in *Marchetti*" was significantly more coercive (*ibid.*). From these premises, it concluded that since *Marchetti* "means that * * * violation [of the wagering tax laws] are no longer punishable directly," then "[i]t follows that they should not be punished indirectly through forfeiture" (A. 18). In our view, however, this reasoning is too facile.

In the first place, the court below simply assumed that the property involved in a forfeiture proceeding rightfully belongs to the individual required to comply with the wagering tax laws. That is demonstrably not the case, once the nature of statutory forfeiture is understood. Moreover, the court was mistaken in suggesting that "[t]he only apparent purpose of 26 U.S.C. § 7302, as applied here, is to punish violators of Sections 4411 and 4412 * * * by taking away money used in committing the violations" (A. 18). We submit that the Sixth Circuit correctly analyzed the problem in *United States* v. *One 1965 Buick,* 392 F. 2d 672 (C.A. 6), reaching the opposite conclusion from that of the Seventh Circuit in the instant case regarding the applicability of the *Marchetti-Grosso* rationale to forfeiture proceedings. There the Sixth Circuit noted that "[t]he primary purpose" of 26 U.S.C. 7302 is to assist in "the effective enforcement of the revenue laws" (392 F. 2d at 675). Continuing, that court

stated, "A reading of the language of the statute, in the light of the purpose for its existence, leads to the conclusion that it outlaws any property used or intended for use in violating the Internal Revenue laws and sanctions forfeiture thereof" (*ibid.*).[7]

In sum, 26 U.S.C. 7302 authorizes *in rem* proceedings directed against property used or intended for use in violating the internal revenue laws. The wagering tax laws remain valid taxing provisions, despite *Marchetti-Grosso*. While individuals cannot be punished criminally for their violation if the privilege is properly asserted in defense of non-compliance, the taxes due can still be collected civilly. Not only is this a fair reading of the language in the opinions in *Marchetti* and *Grosso* (see *supra*, pp. 8–10), but the Fourth Circuit recently has squarely so held. *Washington* v. *United States*, 402 F. 2d 3 (C.A. 4). In concluding that "the civil liability here involved remains entirely valid," that court relied extensively on this Court's efforts in the *Marchetti-Grosso* opinions to make clear that it was not holding the underlying taxes void. It seems but a short step to conclude that, if the wagering taxes can be collected civilly, the taxing provisions can be enforced—like other valid tax laws—through forfeiture proceedings. As has been pointed out, in a pro-

[7] As noted earlier (*supra*, p. 5), the Sixth Circuit case is presently pending before this Court on petition for a writ of certiorari, No. 619, this Term. The property seized and sought to be forfeited there, it should be noted, include "$305,633.25 in cash, a package containing an unknown amount of currency, three Buick automobiles, and three adding machines" (392 F. 2d at 674).

ceeding against property used in a gambling business without payment of the prescribed taxes, the government may be awarded a judgment of forfeiture even though no person is—or can be—criminally convicted for the violation giving rise to the forfeiture. Similarly, it is irrelevant whether the owner of the property forfeited would share any criminal responsibility, without regard to the Fifth Amendment. The plain purpose of Section 7302 is to make the property used in violation of the revenue laws the offending thing, and to remove that property from circulation.

Since forfeiture proceedings are *in rem* in nature, they have only a peripheral relationship to the privilege against self-incrimination, which is uniquely and inherently personal in character. Indeed, it might be argued that the privilege has nothing whatever to do with the instant case, and that, at most, only a due process question—relating to the deprivation of property—is potentially involved. Moreover, proof that the particular property sought to be forfeited was intended for use or was in fact used in the business of wagering will often depend on evidence entirely apart from that relating to non-payment of the prescribed taxes. Non-payment is a necessary predicate, to be sure, for a forfeiture proceeding under Section 7302. But such non-payment can ordinarily be proved by government records and the testimony of revenue officials. Engagement of an individual in the wagering business is also, in this context, a necessary predicate for a forfeiture of property under Section 7302. But that can be shown in a variety of ways many of which have nothing whatever to do with the use of particular

property in such activity.[8] Conversely, showing that certain property—whether money or items of personalty like cars—were used in connection with wagering activities frequently requires proof of a rather different character. It is not enough to show that someone engaged in a business subject to a certain tax and that the prescribed taxes have not been paid. It must be shown that the particular property of which forfeiture is sought was used in that sort of illegal business, and thereby became the offending thing against which the *in rem* proceeding is directed. Once these considerations are recognized, it becomes clear that a claim of privilege to protect against such a forfeiture is at best a rather attenuated one.

C. FORFEITURE PROCEEDINGS UNDER 26 U.S.C. 7302 DO NOT VIOLATE THE UNDERLYING SPIRIT OF THE PRIVILEGE AGAINST SELF-INCRIMINATION

Even if the rationale of *Marchetti-Grosso* is held to have no direct application to forfeiture proceedings, a question may remain whether the underlying spirit of the privilege against self-incrimination is violated by forfeitures in the wagering tax context, or indeed under 26 U.S.C. 7302 generally. In recent years this Court has broadly stated that the privilege is undermined if a "penalty" is attached to its invocation. See, *e.g., Griffin* v. *California,* 380 U.S. 609, 614. Although a "penalty" for this purpose has been

[8] Compare the forfeiture statute involved in *One 1958 Plymouth Sedan* v. *Pennsylvania,* 380 U.S. 693, described by the Court as having the object of penalizing for the commission of offenses, and thus "quasi-criminal" in nature, with the reasons underlying 26 U.S.C. 7302, as articulated by the Sixth Circuit in *One 1965 Buick* and discussed *supra*, pp. 22–23.

characterized as anything which "cuts down on the privilege by making its assertion costly (*ibid.*), no precise meaning has been given to the concept, and actual application of the notion, outside the criminal context, has been limited. It has been applied, we recognize, in circumstances where the "penalty" involved for invocation of the privilege was the loss of a means of livelihood. *Spevack* v. *Klein*, 385 U.S. 511; *Gardner* v. *Broderick*, 392 U.S. 273; *Sanitation Men* v. *Sanitation Commissioner*, 392 U.S. 280. But in none of those cases, which arose outside the criminal context, did the Court conclude that an individual could automatically bring himself within the Fifth Amendment's shield by simply claiming that some "penalty" had been imposed upon his invocation of the privilege. Cases like *Campbell Painting Co.* v. *Reid*, 392 U.S. 286, make that quite clear (see the discussion *supra*, pp. 20–21).

Moreover, in *Spevack*, *Gardner* and *Sanitation Men* the Court recognized that there were circumstances in which what otherwise might be described a "penalty" could lawfully be imposed upon an assertion of the privilege. What was important, the Court in those cases appeared to suggest, was the substantiality of the countervailing governmental interest in obtaining the information, when balanced against the significance of the "penalty" involved.[9] A "penalty" such as

[9] See *Spevack*, 385 U.S. at 519–520 (concurring opinion of Mr. Justice Fortas); *Gardner*, 392 U.S. at 278; *Sanitation Men*, 392 U.S. at 284. Compare *Garrity* v. *New Jersey*, 385 U.S. 493, where the Court held that testimony compelled by threat of dismissal from employment could not be used in a criminal prosecution against the witness involved.

dismissal from public employment could be imposed, the Court concluded, so long as the result was not to "requir[e] relinquishment of the benefits of the constitutional privilege" (*Sanitation Men,* 392 U.S. at 284. And, as the Court pointedly stated in *Schmerber* v. *California,* 384 U.S. 757, 762, "the privilege has never been given the full scope which the values it helps to protect suggest." See also *Ullmann* v. *United States,* 350 U.S. 422; *Orloff* v. *Willoughby,* 345 U.S. 83; *Maryland* v. *Soper,* 270 U.S. 9.

Here whatever "penalty" might be thought to result from forfeiture is an even more attenuated one than the Court indicated it might sanction in *Spevack, Gardner,* and *Sanitation Men.* One engaged in wagering without complying with the federal tax laws runs the risk that he may forfeit the property which has been used in connection therewith. Those laws remain valid despite *Marchetti-Grosso,* and forfeiture proceedings are a traditional way of enforcing such provisions. If the taxes involved can be collected in a civil proceeding, forfeiture of property used in violating the taxing provisions is similarly appropriate, and consistent with the Fifth Amendment. Forfeitures in the circumstances here involved do not significantly "cut down" on the "values" which the privilege seeks to protect. Indeed, by virtue of *Marchetti-Grosso* a gambler is effectively immunized from criminal prosecution for non-compliance with the wagering tax laws. As a result of this insulation from criminal sanction, he is accorded "the benefits of the constitutional privilege" (*Sanitation Men,* 392

U.S. at 284) to which, under the Fifth Amendment, he is entitled. There is nothing unconscionable about requiring him to run the risk that property used in carrying on a business which, under the federal tax laws, is illegal because of non-payment of the prescribed taxes, might be subjected to forfeiture. The privilege cannot be converted into a license to own and use property in violation of valid taxing provisions.

Finally, as noted earlier (*supra,* p. 14), 26 U.S.C. 7302 is not applicable to the wagering tax laws alone. It provides broadly for the forfeiture of any property used in violation of the federal tax laws generally, unless covered by another specific provision. If Section 7302 is construed as imposing a "penalty" in the wagering tax context, it is difficult to understand why it is not similarly "penal" in other tax contexts to which it applies, for it would appear no more, nor no less, "penal" in one context or the other. Yet, it is only if it is viewed as imposing an impermissible "penalty" that the privilege comes into play. If Section 7302 is so construed, it would be tantamount to determining that forfeitures, except perhaps of contraband, could not be accomplished without proceedings having all the safeguards of a criminal trial, and the entire statutory forfeiture procedure, long sanctioned by this Court (see *supra,* p. 15), would be rendered nugatory. Such a result, we submit, is hardly one that is constitutionally required by the underlying spirit of the Fifth Amendment's privilege

against self-incrimination, in the wagering tax context or otherwise.[10]

II. AT ALL EVENTS, THE RATIONALE OF MARCHETTI-GROSSO SHOULD NOT BE APPLIED RETROACTIVELY TO CASES IN WHICH THE SEIZURE OF PROPERTY SUBSEQUENTLY FORFEITED TOOK PLACE PRIOR TO THE DATE OF THOSE DECISIONS

If the Court should disagree with our construction of *Marchetti-Grosso* in regard to forfeiture proceedings, we urge that the rationale of those decisions should at all events be applied only to cases in which the seizures of property subsequently forfeited took place after this Court decided those cases. Although we have not urged the non-retroactivity of the *Marchetti* and *Grosso* cases with respect to *criminal convictions* which had not yet become final at the time those decisions were rendered, we suggest that forfeitures of property entail different considerations which militate

[10] In a related context, involving the Fourth Amendment, this Court gave at least implicit approval to forfeiture proceedings directed against offending property. Thus, in *Cooper* v. *California*, 386 U.S. 58, the Court concluded that a search of an impounded automobile was reasonable under the Fourth Amendment, and thus lawful, because under State law it was subject to forfeiture (see 386 U.S. at 60–62). In *Cooper*, therefore, the existence of a forfeiture law served to justify a search that otherwise would have been violative of the Fourth Amendment. Compare *Preston* v. *United States*, 376 U.S. 364. Indeed, even the dissenting opinion in *Cooper* appeared to recognize the validity of the State forfeiture statute (see 386 U.S. at 63).

against a general rule of retroactivity with regard to forfeiture proceedings arising out of wagering tax violations. As to forfeitures, *Marchetti-Grosso,* if they apply at all, should apply to seizures after January 29, 1968, the date of those decisions.

Three years ago, this Court ruled that there is no impediment—constitutional or otherwise—to applying new constitutional formulations in a prospective manner. *Linkletter* v. *Walker,* 381 U.S. 618. The Court there concluded that "the accepted rule today is that in appropriate cases the Court may in the interest of justice make [a new] rule prospective" (381 U.S. at 628), and that, in deciding whether a new constitutional rule should be applied retroactively, the particular situation must be assessed in three respects—"the purpose of the [new] rule; the reliance placed upon the [prior] doctrine; and the effect upon the administration of justice of a retrospective application of [the new doctrine]" (381 U.S. at 636; see also *Stovall* v. *Denno,* 388 U.S. 293, 297, where these criteria are restated in substantially similar fashion.)[11] In the dis-

[11] This approach has consistently been followed and has been expanded upon by this Court in subsequent cases involving questions of retroactivity versus non-retroactivity of newly fashioned rules. See, *e.g., Tehan* v. *Shott,* 382 U.S. 406; *Johnson* v. *New Jersey,* 384 U.S. 719; *Stovall* v. *Denno,* 388 U.S. 293; *DeStefano* v. *Woods,* 392 U.S. 631. Moreover, it should be noted that, while the holdings in *Linkletter* and *Tehan* "were necessarily limited to convictions which had become final by the time *Mapp* and *Griffin* were rendered," the Court in *Johnson* pointed out that those prior applications had been made

cussion below, we do not address ourselves to an evaluation of the first consideration—the purpose of the new rule. This Court has fully explored the purpose and meaning behind the Fifth Amendment privilege against self-incrimination in recent cases touching that area,[12] and we do not attempt to minimize the significance ascribed to the privilege in those and related decisions. What we do stress here—as we have emphasized above—is that forfeitures of property under 26 U.S.C. 7302, which are *civil* actions *in rem* in nature, directed at the offending *property,* and which are often occasioned by circumstances unrelated to the owner's personal privilege against self-incrimination, are significantly different from criminal convictions—even if forfeitures are viewed as falling within the ambit of *Marchetti-Grosso.* In this context, we submit, the purpose of the new rule should, on balance, yield to the second and third considerations,

---

"without discussion" and before the Court had actively focused upon the problem (*Johnson*, 384 U.S. at 732). In *Johnson*, *Stovall* and *DeStefano* the Court indicated that cases still on direct appeal and those involving collateral proceedings were to be treated identically, insofar as the applicability of the new rule was concerned. Indeed, in *Stovall*, the Court flatly stated that "no distinction is justified between convictions now final * * * and convictions at various stages of trial and direct review" (388 U.S. at 300). Accordingly, the fact that Angelini is attacking the judgment of forfeiture directly, rather than collaterally, is of no consequence.

[12] See, *e.g.*, *Malloy* v. *Hogan*, 378 U.S. 1; *Griffin* v. *California*, 380 U.S. 609; *Tehan* v. *Shott*, 382 U.S. 406; *Miranda* v. *Arizona*, 384 U.S. 436.

namely, the *reliance* placed upon the prior doctrine, and the *effect* that a retrospective application of the new doctrine would have upon the proper and effective administration of justice, should these factors be viewed as conflicting here.[13] Cf. *Tehan* v. *Shott*, 382 U.S. 406, 413–416; *DeStefano* v. *Woods*, 392 U.S. 631, 634–635.

In 1953, this Court concluded that the Fifth Amendment privilege against self-incrimination did not constitute a defense to prosecutions based on willful failures to register and pay the special occupational tax as required by Sections 4411 and 4412. *United States* v. *Kahriger*, 345 U.S. 22. That holding was reaffirmed in 1955. *Lewis* v. *United States*, 348 U.S. 419. Since 1956, in reliance upon those decisions, $6,686,098.22 worth of money and property has been

[13] Should the Court ground a decision upholding the view of the court below that forfeiture proceedings in the wagering tax context are inconsistent with the privilege, not upon *Marchetti-Grosso*, but upon the notion that an impermissible "penalty" upon the assertion of the privilege under the rationale of *Griffin* v. *California*, 380 U.S. 609, thereby results (see the discussion *supra*, pp. 25–29), an even stronger argument for non-retroactivity is available by virtue of this Court's decision in *Tehan* v. *Shott*, 382 U.S. 406, which held *Griffin* non-retroactive. While *Tehan* reached only cases on collateral review in this respect, that was simply the result of the Court's not focusing upon the matter and applying *Griffin* to cases still on direct review without consideration (see note 11, *supra*). A like approach, in light of *Johnson*, *Stovall*, and *DeStefano*, would presumably no longer be taken, and a new rule analogous to that adopted in *Griffin* would not be applied retroactively at all, whether a potentially affected case was on direct review, as here, or had previously become final (see note 11, *supra*).

seized under 26 U.S.C. 7302 as property used or intended for use in violation of the wagering tax laws.[14] Although there are no reliable statistics indicating what percentage of that property was judicially restored to claimants, or what percentage was eventually returned to claimants by way of remission or mitigation, we think that it is fair to say that, in light of the nature of the criminal activity giving rise to forfeitures in the wagering tax context, a very high percentage of that property was actually forfeited to the United States. Once forfeited, the cash value of the property was treated as collections of internal revenue and was deposited in the general treasury (26 U.S.C. 7406).[15] And the Internal Revenue Service

[14] The Intelligence Division of the Internal Revenue Service has maintained statistics on seizures for violations of the wagering tax laws since 1956. Those figures are as follows:

VALUE OF PROPERTY SEIZED

Fiscal year	Automobiles and other property	Currency	Total
1956	$36,272.98	$58,417.32	$94,690.30
1957	129,004.00	104,841.10	233,845.10
1958	99,956.67	148,078.46	248,035.13
1959	116,335.87	209,198.05	325,533.92
1960	128,421.85	140,647.20	269,069.05
1961	175,383.00	400,795.00	576,178.00
1962	208,914.00	368,874.00	577,788.00
1963	289,288.00	377,191.00	666,479.00
1964	356,608.00	665,020.00	1,021,628.00
1965	326,359.00	860,923.00	1,187,282.00
1966	275,957.69	463,185.25	739,142.94
1967	294,830.35	451,596.43	746,426.78
Totals	$2,437,331.41	$4,248,766.81	$6,686,098.22

[15] In the event that the property seized is not currency, the property—usually automobiles—may, upon proper application, be used by the seizing agency (see 40 U.S.C. 304h, 304i). In the event the property is not used, it is sold at auction and the proceeds are deposited with other currency as collections of internal revenue (26 U.S.C. 7406).

has advised us that during the past seven years alone (fiscal years 1961–1967), 1080 automobiles have been seized as property used in violation of the wagering tax laws.

We do not suggest that all or any of this property would be subject to return regardless of how the court should rule in this case. Presumably, in most of those cases, in view of the existing decisions of this Court, no claim was made that the illegal use of property resulting from failure to pay the prescribed taxes, stemmed from the owner's fear that payment would incriminate him. But see *Grosso* v. *United States,* 390 U.S. 62, 70–71, where the failure to assert a privilege claim as to certain counts was held inconsequential. In any event, the potentialities for a volume of litigation relating to property forfeited in the past, whatever the ultimate outcome,[16] provide a sound and ample practical reason for this Court to make clear that the *Marchetti-Grosso* decisions do not have retrospective application as regards forfeitures. The governmental reliance upon *Kahriger* and *Lewis* in bringing forfeiture proceedings, which is plain, and the substantial burden which would be placed upon the proper and effective administration of justice if the *Marchetti-Grosso* rationale were to be applied retroactively to forfeiture cases, which is demonstrable, combine to justify such a ruling. That is particularly so here,

[16] See *Sultzbach Clothing Co.* v. *United States,* 10 F. 2d 363 (W.D. N.Y.)

where what is involved is not the severity of a criminal conviction or even the loss of one's means of livelihood (cf. *Gardner* v. *Broderick,* 392 U.S. 273), but simply the loss of property which, like "ready cash" used to pay off gambling customers, has been used in the conduct of an illegal business and which may or may not belong to the claimant.

Finally, the proper point of focus for non-retroactive application of *Marchetti-Grosso* to forfeitures is the date of seizure, rather than the date of final judicial determination in the forfeiture proceeding. Under forfeiture law, title vests in the United States as of the date of offending use. See *United States* v. *Stowell,* 133 U.S. 1. As a practical matter, however, the date of seizure fixes the time when the United States takes effective control of that property, and the subsequent judicial action is simply a means of confirming that title. The action of government agents in seizing property used in violation of the wagering tax laws was valid under the decisions of this Court as of the date of seizure and title validly vested in the United States as of that date. In sum, the *Marchetti-Grosso* decisions should in any event not be applied retroactively to divest the United States of title to property thus validly acquired.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the judgment below should be reversed,

and that the judgment of forfeiture to the United States should be ordered reinstated.

ERWIN N. GRISWOLD,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

FRANCIS X. BEYTAGH, JR.
Assistant to the Solicitor General.

BEATRICE ROSENBERG,
LAWRENCE P. COHEN,
Attorneys.

JANUARY 1969.

U.S. GOVERNMENT PRINTING OFFICE: 1969